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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-705

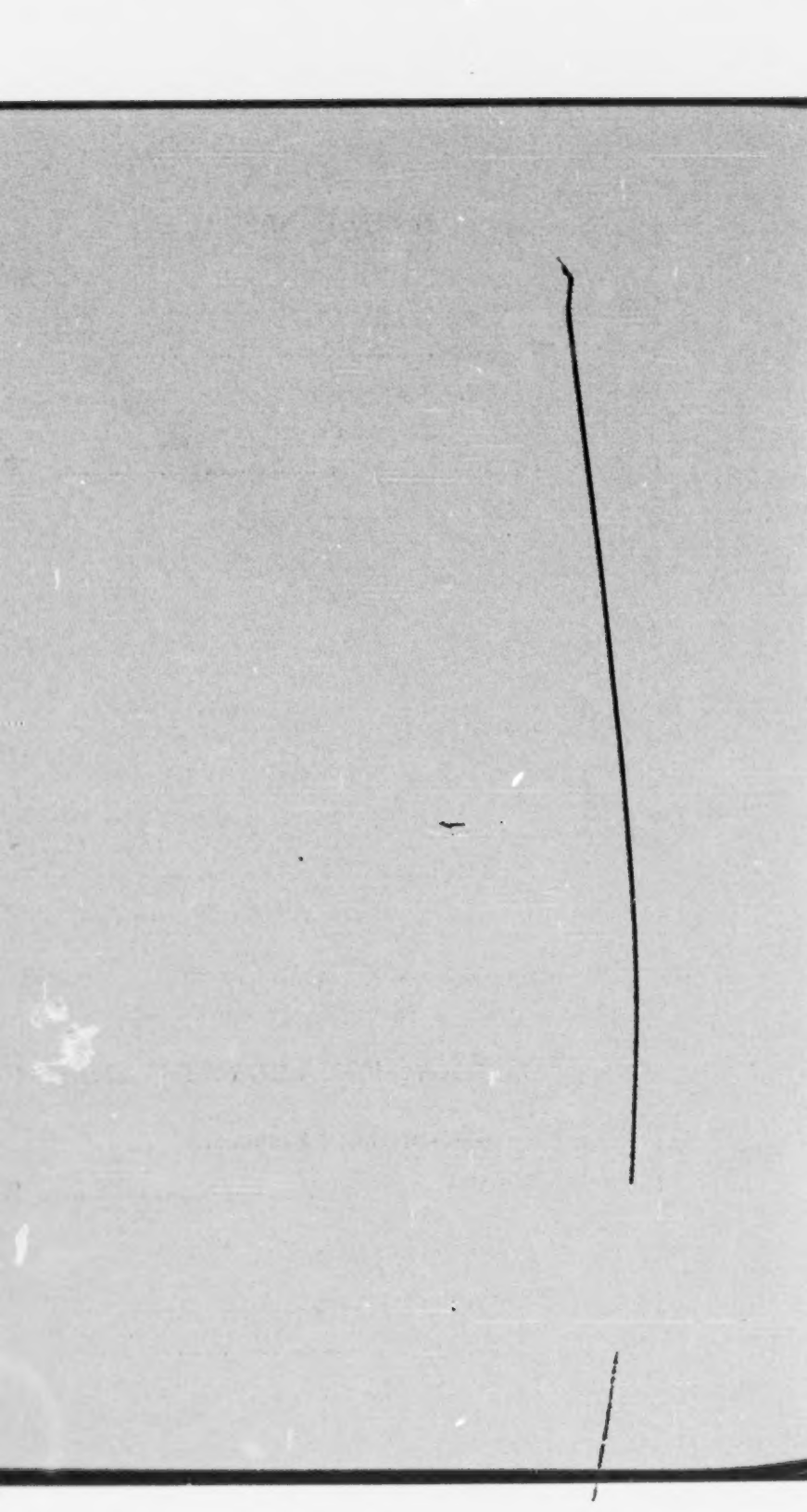
WASHINGTON REEFNET OWNERS ASSOCIATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

BRIEF OF RESPONDENT LUMMI INDIAN TRIBE IN OPPOSITION TO PETITION OF WASHINGTON REEFNET OWNERS ASSOCIATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ZIONTZ, PIRTLE, MORISSET
ERNSTOFF & CHESTNUT
By ALVIN J. ZIONTZ
Attorneys for Respondent
Lummi Indian Tribe

Office and Post Office Address:
208 Pioneer Building
600 First Avenue
Seattle, Washington 98104
Telephone: (206) 623-1255

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON



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OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is published at 520 F.2d 676. The District Court's Opinion appears at 384 F.Supp. 312. Both Opinions are included in the Appendix attached to the Petition filed with the Court by Petitioner State of Washington in the related cases, Numbers 75-588, 75-592.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in upholding the District Court's finding that the present reef net fishing area in Legoe Bay off Lummi Island is within the usual and accustomed grounds and stations of the Lummi Indians?

TREATIES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

The Treaty of Point Elliott, January 22, 1855, 12 Stat. 927, Article V, provides:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory . . .

Article VI, United States Constitution requires that:

> . . . all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . .

STATEMENT OF THE CASE

Proceedings Below

In September, 1970, the United States commenced litigation against the State of Washington on its own behalf and as trustee for several Indian tribes, charging that State statutes, regulatory provisions and practices were violative of the rights of Indians to fish in the waters of Western Washington as guaranteed to them in six treaties made between the tribes and the United States, including the Treaty of Point Elliott, *supra.* Shortly afterwards, a number of Indian tribes party to the treaty intervened as plaintiffs. The Lummi Indian Tribe was one of the intervenor-plaintiffs.

The Lummi complaint in intervention alleged, in addition to the general allegations of State violation of treaty rights, that non-Indians, operating under licenses issued by the State of Washington, had monopolized reef net locations at the Lummi's usual and accustomed grounds and had excluded them from reef netting, in violation of their treaty rights.

The Reefnet Owners Association intervened and claimed that they "enjoyed historic fishing rights" in the waters of Lummi Island, among other areas, and were entitled to continue using these rights under state law. The issue between the Lummis and the Reefnet Owners Association was stated in the final pretrial order as being: whether the sites of non-Indian reef net fishermen are on the usual and accustomed grounds and stations of the Lummi Indians; and, if so, whether these non-Indians have monopolized these grounds to the exclusion of the Lummi Indians.

The District Court found in the affirmative as to both issues after taking extensive evidence. (Fourteen findings of fact were made on the issues) The Court deferred for later consideration the relief to be afforded the Lummis.

The Petitioners appealed to the Ninth Circuit Court of Appeals on the issue between the Reefnet Owners and the Lummi Indians. That Court considered this issue separately from the general issues in the case between the State of Washington, the United States and the intervenor Indian tribes. The Ninth Circuit Decision upheld the District Court in its disposition of the claims of the Lummi Indian Tribe and specifically sustained its finding of fact that the reef net operations were within Lummi usual and accustomed grounds.

The question of whether the Reefnet Owners are fishing on Lummi usual and accustomed ground is brought to this Court only on the Petition of the Reefnet Owners and is not raised by any of the other parties.

Summary of Facts

The technique of reef net fishing was developed by the Indians. Both the aboriginal and modern reef net operation employ the same basic principle developed and used by the aboriginal Lummis; namely, the creation of an artificial reef by means of ropes camouflaged with grass and other materials to give an appearance of a reef and to lead the migrating salmon upward into a net slung between two boats which is lifted when the fish enter the net. Modern gear incorporates numerous refinements and improvements, including the addition of electric power to pull the nets and heavy anchors and cables to hold the boats against tidal currents.

The Court found that Legoe Bay was one of the Lummi usual and accustomed reef net areas at the time of the making of the Treaty of Point Elliott. After the Treaty, the Indians continued to use these locations until about 1894 when fish traps operated by whites were installed so as to render valueless many of the Lummi reef net locations. The Court further found that as a result of the white's use of fish traps (now illegal under state law) and by the widespread use of other fishing gear, the fish had been driven from the shallower waters and now could only be taken in the deeper waters of the Bay.

The Court found that all Lummi reef net fishermen had been squeezed out of the fishery and that of the present

43 reef nets being operated in Legoe Bay, none was owned by a Lummi. These locations are occupied by members of the Petitioner association who occupy fixed positions on the grounds and maintain a "gentlemen's agreement" to the effect that they will not yield their location to anyone unless the occupant is willing to sell his equipment to a would-be purchaser. If the member does not desire to sell his equipment, no change in occupancy of the location can occur There is no voluntary yielding of the location or rotation to other locations. Most importantly, the members of the reefnetter's association do not recognize Lummi Indians as having any treaty right to occupy a position on the reef net grounds, and as far as the Reefnet Owners are concerned, they would not concede that an Indian has any different right than a non-Indian seeking to acquire a location on these grounds.

ARGUMENT

A. The Question Presented by the Petition is Entirely a Question of Fact and is Therefore Not a Proper Basis for Granting Certiorari

The Petition states the question presented for review as follows:

> Are the present-day reefnetters operating in what were, at treaty times, "usual and accustomed grounds and stations" of the Lummis?

The issue as stated by the Petition, is entirely a question of fact, and as such, is not a proper basis for granting of certiorari. Furthermore, the issue of fact involves only the Lummi Indian Tribe and the Washington Reefnet Owners Association—no other parties are involved.

The Petitioner urges that the question of whether its members are, *in fact*, fishing upon the "usual and accus-

tomed grounds and stations" of the Lummis presents "an important question of federal law". The assertion is wholly unsupported by anything in the Petition. An examination of the Petition itself fails to disclose any analysis or discussion of any question of law. Instead, the Petition deals entirely with evidentiary matters which are urged as warranting reversal of the District Court.

Like all such arguments, the recital adverts to items of evidence, testimony of witnesses, affidavits and the like, which is highly selective and omits contrary evidence and the larger context in which the evidence was taken. The argument does nothing more than invite the Court to reconsider evidence going to a narrow issue of fact which was decided contrary to the Petitioner's claims. The Petition therefore fails to meet the requirements of Rule 19(1) of the Rules of the Supreme Court and should therefore be denied.

B. The Record Abundantly Supports the Findings Relevant to This Petition

The Petitioner's claim is that their members are fishing in deeper waters than were fished by the Lummi Indians at treaty times by means of devices not in existence at treaty times, (even though within the waters of the same bay) and that they are not on "usual and accustomed grounds" as that phrase is used in the Treaty.

But the District Court found that at the time of the Treaty, the waters of Legoe Bay were a usual and accustomed reef net fishing ground of the Lummi Indians. That after the making of the Treaty, the Indians continued to reef net on these grounds until fish traps operated by whites substantially interfered with their operations. These traps

were outlawed by State law in 1934, but since the cannery which bought their fish had closed, they did not resume the fishery until 1939 when a new cannery opened. By this time however, non-Indians had entered the reef net locations. The non-Indians gradually squeezed out the few remaining Lummis, so that today no Lummi reef nets remain.

There are now 43 reef nets being operated in Legoe Bay. Although some positions in the fishery are vacant, they remain so because the sites are not productive. The location of the reef net is one of the most critical factors in the success of the operation and profitable positions are occupied permanently, unprofitable ones abandoned or operated intermittently or experimentally.

Most importantly, the Court found that the heavier volume of fish in the vicinity of Legoe Bay had travelled close to shore, but due to the installation of fish traps and the abundance of other fishing gear in the reef net area, the migratory path of the fish has changed so that now fish must be taken in deeper water.

In aboriginal times Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including the operation of the reef nets. Since treaty times, Indians and non-Indians have adopted new fishing techniques and gear. Indians no longer fish from dugouts just as non-Indians no longer fish from wooden sailboats. Indians no longer use bark nets and non-Indians no longer use cotton or linen nets. Acculturation of western Washington Indians into western culture began prior to treaty times and has continued to the present day. Modern gear incorporates numerous refine-

ments and improvements over the aboriginal Indian gear, including the addition of electric power to pull the net.

All the economic reef net locations are occupied by memmers of the Reefnet Owners Association so as to maintain an exclusive occupancy system. A member of the Lummi Tribe can reef net in a profitable location only by purchasing, from a present reefnet owner his fishing gear, *provided* such owner is willing to sell. No present-day Lummis are willing to contest any of the present occupants for possession of a reef net site nor are they willing to invest money in gear to occupy locations which are not economically productive. Lummi Indians would be interested in participating in the fishery if they had access to productive locations, but object to having to purchase a white reefnetter's fishing gear in order to occupy a good location.

The Court specifically found that some of the present-day non-Indian reef net gear in Legoe Bay is located directly over the stations occupied by the Lummis at treaty times and thereafter.

These findings are determinative of the claim of Petitioner that it's members' reef netting activities in Legoe Bay are not in contravention of the rights of the Lummi Indians under the Treaty of Point Elliott.

The Petitioners made the same contentions before the Ninth Circuit as they make in their Petition for Certiorari, but obviously failed to meet the burden of showing the District Court findings to be clearly erroneous, the standard which is applicable under Rule 52(a), Federal Rules of Civil Procedure. As the Ninth Circuit stated in its opinion:

> Insofar as the district court thus concluded that usual and accustomed grounds and stations extended a suf-

> ficient distance from shore into Legoe Bay to enable the Indians to harvest most productively the available fish, that finding is not clearly erroneous. The term "grounds" as used in the treaties denotes a broader dimension than "stations" and can readily be understood to include the distances from shore at which present reef netting is done.

520 F.2d 676, 692 (9th Cir. 1975)

C. The Relief Granted is Clearly Correct as a Matter of Law

Having found that the Legoe Bay reef net area is a Lummi usual and accustomed ground, the courts below ruled that Lummis could not be excluded from participating in the fishery on those grounds by "gentlemen's agreement" or otherwise. Instead, Lummis had a federally guaranteed treaty right to participate in the fishery on an equal basis with the non-Indians, and to enjoy the benefits of the principle of equal division which is applicable to other usual and accustomed areas.

Having found that the Petitioners are occupying all of the productive sites on the Respondent's usual and accustomed grounds the court below was clearly correct in concluding that the Respondents were entitled to equal access under the "in common with" clause of the Point Elliott Treaty. Nor could the Petitioners foreclose access to these grounds by virtue of their physical control of these stations within the grounds. *United States v. Winans,* 198 U.S. 371 (1905).

The District Court did not reach the question of the specific relief which would be granted to the Lummi Tribe in gaining access to this fishery, but left this for future determination by the court. The Ninth Circuit modified this by suggesting that in granting future equit-

able relief, "the district court should give regard wherever practicable to minimizing the resulting hardship to present white reef net fishermen". 520 F.2d 676, 692 (9th Cir. 1975)

CONCLUSION

1. The Petition of the Washington Reefnet Owners Association should be denied because the only question which it raises is an issue of fact. That issue is one which directly affects only the Petitioner and this Respondent.

2. The factual arguments made by Petitioner were carefully reviewed by the Ninth Circuit which refused to disturb the lower court's findings and ruling on the issue. The District Court's findings of fact are abundantly supported by the evidence. Petitioner has failed to persuade the Ninth Circuit that the findings are "clearly erroneous" as required by the Federal Rules of Civil Procedure.

3. The Petition fails to demonstrate that the issue it raises is "an important question of federal law which has not been, but should be, settled by this court", nor does it demonstrate that the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision." (Rule 19, Supreme Court Rules)

4. The decision of the court below on the issue raised by the Petition is correct as a matter of law.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET
ERNSTOFF & CHESTNUT
By ALVIN J. ZIONTZ
Attorneys for Respondent
Lummi Indian Tribe